United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

ORIGINAL

76-1084 B P/S

UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 76-1084

UNITED STATES OF AMERICA,

Appellee,

- against -

HARRY G. HACKETT, JR.,

Appellant.

On Appeal from the United States
For the Southern District of New York

APPELLANT'S BRIEF AND APPENDIX

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Of Counsel:

JEFFREY DWIGHT ULLMAN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

-against- 76-1084

HARRY G. HACKETT, JR.,

Defendant-Appellant.

----------X

STATEMENT OF THE CASE

Harry G. Hackett, Jr. was indicted in the Southern District of New York, together with Leon Laws and Richard Johns, for conspiracy and several substantive violations of the Federal narcotics laws. Laws and Johns pleaded guilty before Hackett's trial; Johns subsequently testified for the Government. The Government's case revolved about two direct sales of small amounts of cocaine (totalling approximately three ounces) by Johns to two undercover New York City police officers assigned to the Drug Enforcement Task Force. Johns testified that he had obtained the cocaine from Hackett.

STATEMENT OF FACTS

The Government's Case:

New York City police officer Edward Newton, using the name, "J.J.", and pretending to be a "pimp", who

dabbled in drugs as a sideline, met Richard Johns in April of 1974. (21-22*). Johns introduced Newton to one James Lindsey, from whom Newton negotiated the purchase of one ounce of heroin on April 25, 1974. After the sale was consummated, Johns asked Newton for "a piece of the package", (22) apparently as a fee. Newton declined, but told Johns he was interested in purchasing cocaine, and asked Johns if he could obtain a source of supply for the drug. (22).

Johns, on the other hand, testified that the purpose of the April transaction was to assist "J.J." in the purchase of cocaine, not heroin, as the latter testified. (263-272). Johns denied ever requesting a "piece of the package" from Newton, (281-282), and eschewed any knowledge that the transaction had been one for heroin. (263-272). The Government conceded, out of the presence of the jury, that Johns' testimony in this respect was probably perjurious. (278-279).

*Parenthetical numerical references are to the pages of the trial transcript.

On June 26, 1974, Newton telephoned Johns on three occasions in order to make arrangements for the purchase of one ounce of cocaine. These conversations were recorded by Newton, and the tapes and transcripts of the calls were admitted as evidence. (23-24; 35).*

At about 9:30 that evening, Newton, accompanied by officer Kendall Feurtado, who used the undercover name "Frenchie", drove to the intersection of 95th Street and Riverside Drive, the site selected by Johns for the transaction. (41-42). There, the officers met Johns, who was accompanied by an individual known only as "Bobby", and who was later identified as Robert Holcomb. Johns and Holcomb then entered the building at 230 Riverside Drive; Johns returned a short time later with a vial containing a white powder. (43). Feurtado pretended to test the substance, and then indicated to Newton and Johns that it was a satisfactory sample. (44). Johns then reentered 230 Riverside Drive

According to his testimony, Johns picked up a small plastic bag containing cocaine from a table in the

*The three tape-recorded conversations were marked for identification as Government's Exhibit (GX) 30; the transcripts were marked GX 30A, 30B, 30C, respectively.

living room of the Hackett apartment. Hackett, Johns said, had pointed out the bag to him. (290-291). According to Holcomb, who testified for the Government on rebuttal, Johns went into the back area of the apartment shortly after their arrival, while Hackett and Holcomb shared some brandy. He did not recall witnessing any such transaction. (720; 722-23).

Johns later returned to the officers with an ounce of cocaine. He was paid $800. (45).

On July 23, 1974, Newton again recorded two telephone coversations with Richard Johns (GX 31; 31A; 31B) concerning arrangements for the purchase by Newton of one-eighth kilogram or, in the alternative, two ounces of cocaine. (46). During these conversations, Johns, apparently alluding to his supplier, mentions the name, "Harry". (51).

At approximately 9:30 that evening, Newton and Feurtado parked directly in front of 230 Riverside Drive. Their car was equipped with a recording device secreted behind a panel on the dashboard, and a tape recording of their later observations and conversations with Richard Johns was admitted in evidence. (GX 32; 32A).

When Johns appeared, he told Newton and Feurtado that his supplier was not yet at home. (59). Some time

thereafter, Harry Hackett walked by the surveillance car, entered the building, and took the elevator to the 10th floor. (65). Johns followed. A short time later, Leon Laws arrived in a gypsy cab carrying a blue suitcase later discovered to contain several pounds of marijuana. (67). When Johns returned with a plastic bag containing two ounces of cocaine, the officers gave a signal to a back-up team, who surrounded the car and arrested Johns. (68-69).

Johns, advised of his right to remain silent, but not of his right to counsel, (257), was told by the arresting officers, in substance, that he could cooperate or he could go to jail for life. (256; 449). Opting for the former course, Johns lead the officers to Hackett's apartment where Hackett and Hackett's girlfriend, June Murphy, were arrested. (394; 397).

Small amounts of cocaine, larger quantities of marijuana and drug-related paraphernalia were discovered in a bedroom of the Hackett apartment, along with Leon Laws, who was placed under arrest. Laws had a small amount of cocaine on his person. (396). A full search of the apartment disclosed, in addition, several notebooks and personal telephone directories belonging to Hackett. The notebooks contained several pages of cryptic notation. (421-436). A Government witness testified as to significance of the notebook entries in the lexicon of the drug trade.

The Government also introduced Hackett's previous conviction. (523, 537).

The Defense Case:

June Murphy, who was never formally charged or indicted in connection with this case or any other, testified that she had known Hackett since 1973.(560). She stated that Hackett had loaned the use of his apartment to Leon Laws during the early or middle of July, 1974, and that, at that time, he had temporarily moved in with her. (561-562; 568; 585).

On the night of July 23, 1974, Hackett had come to her apartment after work. The two of them had gone shopping at a department store (565), and went to Hackett's apartment at about 10 o'clock.

Receipts from purchases made on the evening of July 23, 1974 by Hackett and Miss Murphy at Abraham and Strauss were admitted as defense exhibits. (666-668).

Hackett was to have had a meeting at his apartment that night with one Steven Stewart, who was paymaster of a shipping firm, U. S. Lines. The purpose of that meeting was to obtain business from U. S. Lines for Hackett's employer, Thomas and Thomas Transport, Inc., a trucking firm for which Hackett was a vice president. Stewart, who arrived at Hackett's apartment after the arrests on July 23, corroborated Miss Murphy's testimony in this respect. (594-595; 540).

Henry Thomas, Hackett's employer in 1974, and president of Thomas and Thomas Transport, Inc., testified that Hackett was his vice president in charge of finance, and had told him of his efforts to secure business from U. S. Lines. (649; 663-664). Thomas also testified as a character witness, and stated that he held Hackett in very high regard personally (652), and indeed had hired Hackett because his excellent reputation for honesty had preceded him. (649-650).

Alexander Aikens III, a lawyer, also testified as a character witness for the defendant. Aikens said that Hackett had an excellent reputation for honesty and law abidingness, and that he held Hackett in the highest regard. (689-693).

Edward Hull was the third defense character witness. Hull testified that he was executive director of the Westchester Community Program, a federally funded anti-poverty agency (697), providing education and employment for the hard-core unemployed of the area. Hull sought out Hackett's services for the development of a pilot project to train unemployed persons as tractor-trailer drivers, having heard of Hackett from others.(697). The project, as ultimately drafted by Hackett, was approved and funded by the U. S. Department of Labor.(697-698). Hull testified

that, in his opinion, Hackett's integrity and character were above reproach. (698).

At the close of the evidence, the Defense submitted the following request to charge on the issue of character:

> Mr. Hackett, you recall, introduced evidence tending to establish his good reputation in his community prior to the indictment in this case. Such evidence may indicate to you that it is improbable that a person of good character would commit the crime or crimes charged. Therefore, the jury should consider this evidence along with all the other evidence in the case in determining the guilt or innocence of Mr. Hackett. The circumstances may be such that evidence of good character alone may create a reasonable doubt of Mr. Hackett's guilt, although, without it, the other evidence would be convincing.
>
> The jury should always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

The Court expressly declined to give this requested charge. (845). Defense counsel argued that if the Court chose to give the character charge in other language, any such charge should convey the thought that the jury is entitled to predicate a verdict of acquittal upon the character testimony, and upon that evidence alone. (849-850). The Court still declined. (850). Later, after

the jury had begun its deliberations, a specific exception to the Court's charge was entered in the record. (931-934)

On December 3, 1975, Hackett was convicted on all counts. On January 30, 1976, he was sentenced to a term of six years imprisonment to be followed by a term of six years special parole. From this judgment of conviction, Harry Hackett appeals.

POINT I

THE COURT DID NOT FAIRLY CHARGE THE JURY ON THE ISSUE OF CHARACTER

A defendant who puts his character in issue in a criminal case is entitled to have the Court instruct the jury that such evidence may be considered by them as proof that it is unlikely that the defendant committed the crimes charged in the indictment, and, as well, that the jury may predicate a reasonable doubt on evidence of the defendant's good character alone. Here, the defendant did not get such in instruction, although he specifically requested it. Instead, the Court's charge on the subject conveyed precisely the opposite import. On the issue of character, the Court charged:

> Now, there was evidence in this case given by two of the defendant's witnesses as to his good character. Good character is to be weighed as a factor in the defendant's favor. You should consider it together with all the facts and circumstances which have been put before you and then give it the weight to which you think it is entitled.
>
> A defendant is not entitled to a verdict of acquittal simply because he possessed a good reputation for honesty or obedience to the law before the indictment.
>
> However, when considered along with all the other evidence the defendant's reputation, like other

> factors in his favor, may generate a reasonable doubt as to his guilt.
>
> If, after considering all of the evidence introduced in this case, including the evidence of the defendant's reputation for good character, you have a reasonable doubt in your minds with respect to any of the counts of this indictment, you should acquit the defendant.
>
> You should return a verdict of guilty only if you are convinced on the basis of all the evidence, including the evidence of the defendant's reputation for good character, that the charge against the defendant has been proved beyond a reasonable doubt. (914-915).

The jury thus was told that, although character evidence was to be considered along with the other evidence in the case,

> A defendant is not entitled to a verdict of acquittal simply because he possessed a good reputation for honesty and obedience to the law before the indictment.

In effect, then, the jury was told that they should not and could not predicate acquittal solely upon the evidence of the defendant's good character. Not only did this erroneous instruction misstate the law, but it mischaracterized the proper function of character evidence, suggesting that it was offered as an excuse

or a factor t be considered in mitigation and not as a defense, bearing, properly, upon the probability of guilt. Indeed, the error was compounded by certain remarks of the Court during the defense summation.

Toward the end of the defense summation, counsel referred to certain facts adduced as part of the character testimony of one of the defense witnesses, Edward Hull. Hull had testified to his association with the defendant, Hackett, in the development of an anti-poverty job training program, as the basis of his opinion of the defendant's character. The testimony was clearly admissible under Rule 405(a) and 405(b) of the Federal Rules of Evidence, and indeed, no objection was made to the testimony at the time it was offered. It was not until the defense summation that the Court charged the factual basis of Hull's opinion out of the case:

> THE COURT: You are going into great detail about an incident that should never have been testified to by this witness, which is on the record what it is worth but I will be compelled to charge this jury that even if they find that your client did things, that that would not in and of itself be any basis for delucing [sic], [deleting], objecting or accepting [sic], [excepting], any of the evidence in this case.

> He has testimony in this case with respect to his good character and I will give them a charge with respect to how they should deal with good character testimony, but for you to give them the details of a community funded program for the purpose of training trailer truck drivers and urge that as a defense in this case is not appropriate, Mr. Ullman.
>
> MR. ULLMAN: Your Honor, it is a fact --
>
> THE COURT: It is not a defense. You may not urge it as a defense and I am sorry it was allowed to come into the case, but I am constrained to ask the jury to withhold consideration of this testimony until they hear my charge with respect to how to deal with character evidence. There is evidence of the defendant's good character and I will charge you with respect to how to deal with that. (805-806)

The effect of this colloquy was clearly to tell the jury that the evidence submitted on the issue of character was not a defense, and thus that character itself was not a defense.

Precisely the opposite, however, has been the law in the Federal courts, at least since 1896. In Edgington v. United States, 164 U.S. 361 (1896), the Supreme Court held that, in a case where character is put in issue by the defendant, the Court should instruct the jury that it may find a reasonable doubt based solely

on character, even though without evidence of good character, the Government's case would have been convincing. Reaffirming the rule, the Supreme Court noted in Michelson v. United States, 335 U. S. 469, 476 (1948):

> But this line of inquiry [into the defendant's reputation in the community for various traits of character] firmly denied to the State is opened to the defendant because character is relevant in resolving probabilities of guilt. He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. (footnote omitted)

In United States v. Leigh, 513 F.2d 832 (5th Cir. 1975), the defendant, a doctor, was charged with a violation of the narcotics laws. He introduced character evidence which the Government sought to rebut with its own witnesses. The Court charged the jury in language similar in import to the language of the charge given by the Court here:

> Such evidence of good reputation ... may indicate to the jury that it is improbable that a person having such

> a reputation would commit the offense charged. Therefore, the jury may consider the reputation along with that contradicting it, if you find that it does, along with all the other evidence in the case in determing the guilt or innocence of this defendant on the offenses charged.
>
> The circumstances may be such that evidence of good reputation as to truth, veracity, sobriety and being a peaceable and law-abiding citizen may alone create a reasonable doubt of the defendant's guilt, although without it, the other evidence would be convincing. However, evidence of good reputation should not constitute an excuse to acquit the defendant if you, the jury after weighing all of the evidence is convinced beyond a reasonable doubt that the defendant is guilty of the crimes charged in the indictment. (Emphasis in original)
> United States v. Leigh, supra, at 785.

The Court found the commission of a fatal error in the giving of the emphasized portion of the charge. For that language suggested to the jury, as did the charge given here, that evidence of the defendant's good character was to be considered not as bearing upon the likelihood that the defendant committed the crime, and thus as a defense, but as an excuse or justification for his acts. The Fifth Circuit held:

> [T]he final sentence of the charge is so fatally defective that it negates the entire instruction, and requires reversal of appellant's conviction. First, of course, the sentence is an erroneous statement of the law. At least since Edgington v. United States, [supra] the rule has been that the jury must consider reputation evidence in the same manner as it considers all other evidence.... Seizing on this sentence, the jury could easily have formed the impression that reputation evidence could only be used to tip the scales in defendant's favor if the case were close; this is precisely the contention rejected by the Supreme Court in Edgington, supra.
>
> Finally, we are particularly troubled by the judge's use of the word 'excuse'. The connotations of the word subtly reinforce the ideas that reputation evidence is to be treated differently from other evidence, that if the jurors were to acquit the defendant on the basis of reputation evidence, they would be accepting his 'excuse' rather than his 'defense'; that if the jurors let the defendant go free on the basis of such evidence, they would be 'excusing' his commission of the crime rather than 'acquitting' him of it. Id., at 786. See also, United States, v. Lewis, 482 F.2d 632, 637 (D.C. Cir. 1973).

In United States v. Minieri, 303 F.2d 550 (2d Cir. 1962) and United States v. Cramer, 447 F.2d 210 (2d Cir. 1971), the Court affirmed convictions in spite of the failure of the Court to properly instruct the jury on character. However, in Minieri, the defendant neither submitted any request to charge on character, nor in any

way excepted to the charge as given. In Cramer, although the defense did not get the "standing alone" charge it sought, the Court's charge was "sufficiently explanatory of the effect reputation testimony has on the prosecution's burden of proof", United States v. Cramer, supra, at 219. There, the trial court had charged, insignificant part, that evidence of good reputation

> may be considered with the other evidence in the case, and may in connection with the other evidence, be sufficient to raise a reasonable doubt in your mind ....
> Id.

However, in neither Minieri nor Cramer did the trial court add to the charge the sort of language objected to here. In neither case did the trial court intimate to the jury that character evidence should not be used by them as a predicate for acquittal. And in both cases, it is important to note, this Court squarely found that the charge given was not the charge to which the defendant was entitled. United States v. Minieri, supra, at 555; United States v. Cramer, supra, at 219.

Accordingly under all the circumstances obtaining here, the conviction should be reversed, and a new trial ordered.

POINT II

AN IMPROPERLY REDACTED TRANSCRIPT OF A TAPE RECORDING WAS SUBMITTED TO THE JURY TO THE PREJUDICE OF THE DEFENDANT.

On July 23, 1974, officers Newton and Feurtado, disguised as "J.J." and "Frenchie", were to have made their second purchase of cocaine from Richard Johns. The Eldorado automobile in which they were traveling that night was equipped with a recording device secreted behind a panel in the dashboard. On that device was recorded some two hours or more of the officers' observations, conversations between themselves and between them and Richard Johns. The tape recording and a transcript of it were offered in evidence by the Government. (Government Exhibits (GX) 32 and 32A) Although only a small portion of the tape was played to the jury, it was given the transcript of the whole. The attention of the jury was directed to the appropriate portions as they were played by the Government.

The tape and its accompanying transcript were offered under the "present sense impression" exception to the hearsay rule now embodied in Rule 803(1) of the Federal Rules of Evidence. Substantial portions of the tape, as a whole, and, specifically, certain parts of the

segments played before the jury were patently inadmissible, and the Court so ruled. The Court directed that the transcript be redacted before being shown to the jury. This was accomplished by the scissoring out of the objectionable portions of the transcript. The defendant specifically objected to this procedure, arguing instead that a "clean" copy of the appropriate pages of transcript be prepared. The objection was overruled.

This Court has maintained that redacted exhibits should not go to the jury under circumstances which draw undue attention to the excised portions or which invite the jury's speculation about the contents of the information withheld from it. See e.g., United States v. Harrington, 490 F.2d 487 (2d Cir. 1973) (innefectively masked "mug shots" impermissibly placed before the jury the suggestion that the defendant had a criminal record).

In United States v. Cirami, 510 F.2d 69 (2d Cir. 1975), the indictment in a tax evasion case incorrectly alleged that the defendants, rather than the corporation of which they were the principal officers, owed unpaid taxes to the Government. After the Government had rested, and on motion of the Government, the erroneous language was deleted; the Court thereafter placed brackets around the deleted portions. As it turned

out, the marked copy of the indictment never did go to the jury. Nevertheless, this Court found the potential for prejudice sufficiently strong to warrant the following advisory ruling:

> But, if a jury is permitted to see the indictment, and if any language of that indictment is surplusage or other matter that a jury may properly be instructed to disregard, we think the preferable course is to prepare a retyped 'clean' version of the indictment, omitting the language to be disregarded without any indication of its omission. If the language is not to be considered by the jury, it is surely better to remove it from their scrutiny, rather than rely on instructions. Crossing out or covering the deleted words only serves to arouse the jury's curiosity and stimulate unwarranted speculation as to the full scope of the original allegations. (Emphasis supplied.)
> United States v. Cerami, supra, at 74.

The emphasized language applies with equal if not greater force in the context of this case. Here, although the objectionable portions of the tape were not played to the jury, the expurgated transcript it received had been edited with a razor, in a manner reminiscent of the fashion in which, in times of war, letters from servicemen are censored to prevent the revelation of classified or other sensitive information. The

sole effect of this excision was merely to tell the jury that there was information contained in the transcript - and thus, the tape - which they were not permitted to read for unknown reasons, and to invite their speculation about the portions which had been excised. Thus, rather than remove patently inadmissible evidence from the jury's consideration, the procedure suggested by the Court and adopted by the Government did nothing but "arouse their curiousity and stimulate unwarranted speculation" about that which they were not permitted to see.

The tape recording and transcript in question reflected police observations on the night they arrested Johns, Hackett, and Laws. While the observations themselves were only mildly incriminatory, the manner in which the transcript was edited can only have served to give undue added significance to this particular piece of evidence to the substantial prejudice of the defendant. Accordingly, his conviction should be reversed.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

A-1

D. C. Form No. 100

CRIMINAL DOCKET

74 CRIM. 943

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U.S.:*
vs.	Daniel J. Pykett, Sp. Atty.
HARRY G. HACKETT, JR.-1,2,3,4 &5	264-6394
LEON S. LAWS-1,3,4&5	
RICHARD D. JOHNS-1,2,3	
	For Defendant:
	(3)Richard Rosenkranz
	66 Court St.
	Eklyn,N.Y. 11201
	tele: Tr 5-9440
	(1) David Blackstone
	401 Bw'ay,NYC
	tele: 226-6684

ABSTRACT OF COSTS (07)	AMOUNT		CASH RECEIVED AND DISBURSED					
			DATE	NAME	RECEIVED		DISBURSED	
Fine,								
Clerk, 203								
Marshal,								
Attorney,								
~~XXXXXXXXXXXX~~ 21								
~~XXXXXXX~~846,812,841(a)(1),(b).								
Consp. to viol. Fed. Narco. Laws.(Ct.1)								
Distr. & possess. w/intent to distr.								
Cocaine & Marihuana,I&II(Cts.2-5)								
(Five Counts)								

DATE	PROCEEDINGS
10-7-74	Filed indictment.
10-7-74	Hackett- David Blackstone,Esq.,335 B'way-NYC.
	Johns- Richard Rosenkrantz,Esq.,66 Court St.B'klyn,N.Y.
10-21-74	Hackett(atty. present) Pleads not guilty. Bail continued($10,000.P.R.B.
	secured by $1,000.)
	Law(atty. present)Murray Mogel,Esq.,(Legal Aid Society) assigned as couns
	Pleads not guilty. Bail continued($10,000.P.R.B. secured by $1,000.)
	Johns(atty. present) Pleads not guilty. Bail continued($10,000.P.R.B.)
	Case assigned to Judge Tenney for all purposes. All defts. motions ret.
	in 10 days. Weinfeld,J.

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
10/[illegible]/75	Govt's. notice of readiness for trial, filed this date.		
10/31/75	R. Johns - filed notice of appearance of atty. (see atty. listing)		
10/31/75	H. Hackett - filed notice of appearance of atty. (see atty. listing)		
02-19-75	Filed deft. Harry Hackett's notice of motion re: severance, suppression, etc.		
9-22-75	Deft. Richard Johns (atty. present) deft. pleads guilty to count 1 only. Pre-sentence investigation ordered. Sentence adj. sine die. Bail cont'd Tenney, J.		
9-22-75	Richard D. John- filed deft.'s acknowledgment of constitutional rights.		
09-30-75	Filed deft. Laws's notice of motion re: suppress statements, etc.		
10-21-75	Deft. Leon Laws (atty. present) withdraws plea of not guilty to ct 5, and pleads guilty to ct. 5 only. Pre-sentence investigation ordered Sentence adj.'d until 11-18-75 at 10AM Bail cont'd. Tenney, J.		
10-21-75	Leon S. Laws- filed deft.'s acknolwedgment of constitutional rights.		
10-22-75	Deft. Harry G. Hackett (U.S. Att. Lawrence B. Pedowitz & defts. atty.) present Pre-trial conference held & concluded held -& concluded. Trial set for 10-28-75. Palimieri, J.		
0-28-75	HARRY HACKETT-filed CJA 20 appointment of counsel Morris Cohen, Esq., 1515 Broadway, N.Y.C. 10036 tele: 869-3973. Tenney, J. issued all copi		
0-28-75	HARRY HACKETT-filed CJA 20 approval for payment of fees of atty. Tenney, JJ. issued all copies.		
10-28-75	H. Hackett (not atty. present) bail revoked. Deft. remanded. Palmieri, J.		
10-29-75	H. Hackett (atty. S. Siegal present) suppression hearing set for 10-30-75. Palmieri, J.		
10-30-75	H. Hackett (atty. present) atty. S. Siegal withdraws as trial counsel, Court reinstates atty. Hausen. Suppression hearing set for 11-19-75, Deft. released on bail previously set. Palmieri, J.		

A-3

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
11-19-75	Defc. Harry. G. Hackett (U.S. Atty. Lawrence B. Pedowitz) Suppression hearing held. Motion denied. Trial 11-24-75. Palmieri,J.
11-20-75	Leon S. Laws~(atty. present) Filed JUDGMENT- 1 yr. on count 5. Execution of sentence is suspended. Deft. placed on probation for a period of 2 yrs., subject to the standing probation order of this Court. Counts 1,3 and 4 aredismissed on motion of deft.'s counsel with the consent of the Govt. Tenney,J. issued all copies.
11-24-75	HARRY G.HACKETT,JR. - Jury trial begun.
11-25-75	Trial cont'd.
11-26-75	Trial cont'd.
11-28-75	Trial cont'd.
12-1-75	Trial cont'd.
12-2-75	Trial cont'd.Jury verdict Deft GUILTY on ct.1..
12-3--75	Trial cont'd. and concluded Deft GUILTY on cts.2.3.4.5...P.S.I. ordered..Daft to surrender on Jan.5, 1976 at 10:30 a.m. in room 506...Deft to report Mon. thru Fri. to U.S.Atty. by phone and Not to move out of the S.D.of NY..Palmieri,J.
12-09-75	H. Hackett-filed CJA 20 appointment of counsel David Blackstone, 401 B'way,N.Y,C. 10013 tele: (212) 226-6684. Tenney,J. issued all copies CJA Clerk
12-09-75	H. Hackett- Filed CJA 20 approval for payment of counsel David Blackstone. Tenney,J. issued all copies cja clerk.
12-16-75	H. Hacket-filed CJA 20 appointing counsel Stanley Hausen(Sub. of Comsel) Tenney,J. issued all copies.
12-16-75	H. Hacket-filed CJA 20 approval for payment of fees of atty. Stanley Hausen. Palmieri,J. issued all copies.
12-23-75	Filed Stip. &Order that deft. H. Hackett,Jr., shall bepermitted to travel by the Shortest available commercial routes between N.Y.,N.Y. and Detroit Michigan, on 12-18-75 and returning on 12-30-75etc. Palmieri,J. (3certified copies to Marshal)
12-30-75	Filed transcript of record of proceedings, dated Nov.24,25,26,28 1975.
01-09-76	Filed copy of stip.& order docketed 12-23-75 and no return indicate
01-20-76	Richard D. Johns(atty.present) Filed Judgment-ct. 1 -3 yrs. Impr. E.S.S. Deft. placed on probation for a period of 3 yrs., subject to the standing probation order of this Court. Courts 2 & 3 are dismissed on motion of deft.'s counsel with the consent of the Govt. Tenney,J. issued all copies.

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DJP:jp

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

-v- : INDICTMENT

HARRY G. HACKETT, JR., LEON S. LAWS and RICHARD D. JOHNS, : 74 Cr. 943

Defendant. :

The Grand Jury charges:

1. From on or about the 1st day of April, 1974 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

HARRY G. HACKETT, JR.,
LEON S. LAWS and
RICHARD D. JOHNS,

the defendants and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

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OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about June 26, 1974 defendant RICHARD JOHNS had a telephone conversation with an undercover agent.

2. On or about June 26, 1974 defendant RICHARD JOHNS entered the premises at 230 Riverside Drive, New York, N.Y.

3. On or about June 26, 1974 defendant RICHARD JOHNS left the premises at 230 Riverside Drive, New York, N.Y. and delivered a package containing cocaine to an undercover agent.

4. On or about July 23, 1974 defendant RICHARD JOHNS met an undercover agent in front of 230 Riverside Drive, New York, N.Y. and had a conversation.

5. On or about July 23, 1974 defendant HARRY HACKETT, JR. signalled to defendant RICHARD JOHNS and both then entered the premises at 230 Riverside Drive, New York, N.Y.

6. On or about July 23, 1974 defendant LEON LAWS entered 230 Riverside Drive, New York, N.Y. carrying a blue suitcase.

7. On or about July 23, 1974 defendant RICHARD JOHNS left the premises at 230 Riverside Drive and delivered a package containing cocaine to an undercover agent.

8. On or about July 23, 1974 defendants HARRY HACKETT, JR. and LEON LAWS possessed cocaine in Apartment 10A at 230 Riverside Drive, New York, N.Y.

(Title 21, United States Code, Section 846)

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SECOND COUNT

The Grand Jury further charges:

On or about the 26th day of June, 1974 in the Southern District of New York,

HARRY G. HACKETT, JR.
and
RICHARD D. JOHNS

the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 24.75 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2)

THIRD COUNT

The Grand Jury further charges:

On or about the 23rd day of July, 1974 in the Southern District of New York,

HARRY G. HACKETT, JR.
LEON S. LAWS and
RICHARD JOHNS,

the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 54.18 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2)

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FOURTH COUNT

The Grand Jury further charges:

On or about the 23rd day of July, 1974 in the Southern District of New York,

HARRY G. HACKETT, JR. and
LEON S. LAWS

the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 4.77 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2)

FIFTH COUNT

The Grand Jury further charges:

On or about the 23rd day of July, 1974 in the Southern District of New York,

HARRY G. HACKETT, JR. and
LEON S. LAWS

the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately 871.96 grams of marijuana.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2)

FOREMAN

PAUL J. CURRAN
United States Attorney

DOCKET NO.

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 1 DAY 30 YEAR 76

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Jeffery D. Ellman
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of { [ ] NOT GUILTY. Defendant is discharged; [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly combining, conspiring, confederating and agreeing with others to distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances, and unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule II controlled substance, to wit, approximately 371.96 grams of marijuana. Title 21, U.S.C. Sec 812, 841(a)(1) and 841(b)(1) (B) Title 18 U.S.C.2.)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) YEARS, on each of counts 1,2,3,4, to run concurrently with each other. SIX (6) YEARS on count 5, to run concurrently with the sentence imposed on each of counts 1,2,3,and 4. Pursuant to the provisions of Title 21, U.S. Code, Section 841, defendant is placed on Special Parole for a term of S X (6) YEARS, on counts 1,2,3,and 4, to run concurrently with each other. FOUR (4) YEARS Special Parole on count 5, to run concurrently with the Special Parole imposed on each of counts 1,2,3,and 4, to commence upon expiration of his term of imprisonment.

SPECIAL CONDITIONS OF PROBATION

—

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON THIS DATE FOR THE CLERK

SIGNED BY

[ ] U.S. District Judge

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DEFENDANT'S REQUEST NO.

CHARACTER EVIDENCE-REPUTATION OF DEFENDANT

Mr. Hackett, you recall, introduced evidence tending to establish his good reputation in his community prior to the indictment in this case. Such evidence may indicate to you that it is improbable that a person of good character would commit the crime or crimes charged. Therefore the jury should consider this evidence along with all the other evidence in the case in determining the guilt or innocence of Mr. Hackett. The circumstances may be such that evidence of good character alone may create a reasonable doubt of Mr. Hackett's guilt, although without it the other evidence would be convincing.

The jury should always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

United States v. Ming, 466 F.2d 1000 (7th Cir. 1972) cert. den. 409 U.S. 915

United States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973)

A F T E R N O O N S E S S I O N

1:50 P.M.

(In open court - jury present)

C H A R G E

Judge Palmieri

THE CLERK: His Honor is about to charge the jury. Any spectator desiring to leave the courtroom must do so now otherwise you must remain seated until the completion of the Court's charge.

Marshal, please lock the door.

THE COURT: Ladies and gentlemen, we have now reached the point in the case at which a stupendous responsibility is about to be placed on your shoulders, that of deciding whether or not the defendant, Harry Hackett, is guilty or not guilty of any one of the several charges posed by this indictment.

You have sworn to undertake your duties without fear, favor or prejudice and I have been so gratified by your patience and your promptness and your attention throughout this trial that I am sure that you will give all of the evidence, all of the arguments of counsel the

consideration which they deserve.

Nothing that I say is intended to affect your judgment in any way. I am discharging my last responsibility or my almost last responsibility in the case by instructing you with respect to your duties and the applicable law to the evidence in this case.

But I am not a juror. I have no intention of becoming a juror. I do not want you to infer from anything that I say or do that I am trying to communicate any hidden message to you. I am not.

I have great respect for jury verdicts. I have great respect for the laws and the traditions which place this stupendous responsibility in your hands where it belongs.

A jury verdict should be based upon the evidence, subject to the law applicable to that evidence, and it should be given by twelve jurors and twelve jurors alone. Not twelve jurors and the Judge, twelve jurors.

That is what the government is entitled to, that is what the defendant is entitled to and that is what I charge you should do.

So, if I refer to any evidence during the course of the charge, please do not feel that my words are the last word with respect to the evidence that has been

presented. Your recollection prevails to the exclusion of the attorneys' recollection and to the exclusion of my recollection.

You will recall that several times this morning summations were interrupted by either Mr. Pedowitz or Mr. Ullman because each one thought that the other one was misstating the evidence.

Well, rely on your own recollection. That is enough. You do not have to have any testimony read in open court unless you really think it is necessary or important enough and if you want that done, of course, that is the record that controls.

Not my recollection, not their recollection, but yours controls and the record controls.

I think, for instance, with respect to the testimony of Holcomb, and I will come to that later, the record does not show that he testified that on such and such a date he was at Hackett's apartment. He never said that in so many words, but he did testify that he came there in a green Corvette car with Johns and he met J.J. and right after seeing J.J. he went into the apartment so it would be a reasonable inference for you to conclude from that testimony that he was there on June 26, 1974, but he did not say it in so many words.

So, Mr. Ullman was right in saying he did not say that. Mr. Pedowitz was right in suggesting that you could infer that from the testimony.

All right, let us pass on. There have been a number of other instances, but I only allude to that to give you an idea of what we are talking about when we say the evidence is strictly in your recollection, within your recollection to determine, and what we mean by what the evidence shows.

Remember, too, that evidence is never contained in the question; that only a question combined with an answer can give you evidence. That if I have asked any questions throughout the trial, they deserve no more and no less consideration than the questions put by counsel.

You should be careful not to allow any rulings of law that I may have made, any colloquy I may have had with counsel, any instructions I may have given counsel, anything that I have done with respect to the conduct of the trial unless I adverted to you and gave you an instruction should not affect in any way the all important judgment which you are about to give with respect to this evidence.

This morning an allusion was made to the statue of justice, the symbolic statue of the lady gowned in

flowing robes that has a sword on one side and clutches a scale in the other and has a blindfold. It is a statue we are all familiar with, I am pretty sure it is not Venus, it is another name, and I was trying to think of what relationship to Greek or Roman mythology it had, but apart from that, the important point I want to make is this:

The idea of that blindfold is not to convey the message that justice is blind. Justice cannot be blind. Justice needs good eyes. Justice needs good ears. Above all justice needs good, fair, equitable, intelligent judgment.

The idea of that blindfold is to convey the notion that justice should not make a distinction between the persons who are to be judged. The poor and the rich, the advantaged and the disadvantaged are all treated equally. Nobody comes into a court of law or should be permitted to come into a court of law with any badge of preferment or with any taint or impairment. It is equality before the law and objective, fair, non-prejudiced judgment on the facts.

I told you at the outset of the case that you should keep in mind the warning that was often posted at grade crossings years ago, to stop, look and listen and

you have listened and you have listened carefully.

Now, when I have completed this charge and you retire to consider your verdict, you will have had placed before you all of the evidence consisting of the testimony of the witnesses, the exhibits marked in evidence and the stipulations of counsel. There have been a number of stipulations of counsel.

All of that evidence, all of the arguments made with respect to that evidence and the rules of law that I charge you should be considered by you in coming to your conclusions.

You have the good name of this Court in your hands. You have come here and you have been asked to make an important decision, an important decision for the persons immediately concerned, an important decision for the administration of justice.

Now, since this is a criminal case the burden of proof rests upon the government and never shifts to the defendant. The government has the burden of proving the defendant guilty beyond a reasonable doubt and the defendant is presumed to be innocent throughout the trial and throughout your deliberations until such time, if that time ever comes, when the presumption of innocence is overcome by proof of his guilt beyond a reasonable doubt.

What do we mean by a reasonable doubt? The basic rule is that the defendant cannot be found guilty if you have a reasonable doubt about any of the facts necessary to constitute the crime. Reasonable doubt may be based on the evidence or the lack of evidence in the case.

A reasonable doubt is such a doubt as would cause a reasonable man to hesitate to act in the more serious and important affairs in life. It is a doubt which a reasonable person has after carefully weighing all the evidence.

Reasonable doubt is one which appeals to your reason, your judgment, your common sense and your experience.

Beyond a reasonable doubt does not mean to a mathematical certainty or beyond all possible doubt. Reasonable doubt is not caprice, whim or speculation.

It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. Vague, speculative or imaginary qualms or misgivings are not reasonable doubts.

If, after a fair, impartial and careful consideration of all the evidence, you are convinced of the guilt of the defendant under any particular count, you must convict him.

If, on the other hand, after such a fair, impartial and careful consideration of all the evidence you doubt the defendant's guilt with respect to any particular count, you must acquit him.

Now, let us turn to the charges against the defendant. Incidentally, the charges are not evidence. The indictment, which I will read to you in a moment, is not evidence. It is proof of nothing. It is a procedural device to bring the case to trial and to put the prospective defendant on notice of what the issues are which are proposed to be tried in the court of law.

The charges here are predicated on the Federal Narcotics Laws. The first count, the conspiracy count, charges that from on or about April 1, 1974 until on or about August 7, 1974, Harry G. Hackett, Leon Laws and Richard Johns, as well as others to the grand jury unknown, conspired to violate the Federal Narcotics Laws.

The second and third counts, which I shall call substantive counts, accuse Harry Hackett of specific violations of the Narcotics Law in that he did distribute and possess with intent to distribute cocaine on June 26, 1974 and July 23, 1974.

The fourth and fifth counts are also substantive counts and charge that on July 23, 1974 the defendant Hackett

possessed quantities of cocaine and marijuana with intent to distribute them.

Substantive counts and conspiracy counts in some respects are governed by a different principle. Generally speaking, a substantive count charges a violation of the law which condemns specific conduct as illegal. For example, the possession or distribution of narcotics.

On the other hand, in a conspiracy count, the offense charged is an agreement or an understanding of two or more persons to commit a violation of the particular substantive law, in this instance the federal laws relating to narcotics.

In the conspiracy charge there is no need to prove a specific violation of the narcotics laws such as possession with intent to distribute narcotics. Conspiracy, which is the collective criminal activity, presents a greater substantial threat to the public and usually is more difficult to detect than the illicit or criminal activity of a single individual.

Because of this and other reasons Congress has made a conspiracy or concerted action of two or more persons to violate the federal laws a separate crime entirely distinct from the substantive crime which may be the underlying objective of the conspiracy.

On the other hand, a substantive count or crime is one under which specific action is condemned as, for example, Counts 2, 3, 4 and 5, which charge the defendant Hackett with distributing and possessing with intent to distribute illegal drugs.

In short, the conspiracy charge relates to the unlawful agreement to commit a crime whereas the substantive counts, 2, 3, 4 and 5 refer to the actual or completed crime.

Since the essential elements, which the government must prove before a conviction can be had, are different in the instance of each crime, each one will be referred to separately and what I propose to do is to read each count to you separately and explain each count giving you a reading and the explanation as we go along until I have covered the five counts.

Now, incidentally, a copy of this indictment will be provided to you and you will have it for reference if you want to look at any particular part of it during your deliberations. You should consider each count in any order that you want. You can do them backwards, you can take one in the middle and go to the end or do it in any order that seems to be convenient to you and your verdict should be a verdict with respect to each count.

When the clerk asks the foreman at the conclusion of the deliberations what your verdict is, the foreman should report with respect to each count.

I might also point out that the indictment in this case names three defendants. Only one of them, Harry G. Hackett, is on trial before you and Harry G. Hackett is the only person whose guilt or innocence you are asked to determine.

You are not responsible for any decision with respect to the other two defendants. We happen to know that Richard Johns has pleaded guilty to one of these counts and I will refer to him later on, so you know about Johns.

We don't know about Laws. His name has come into the case only tangentially and peripherally, but in any event please do not be concerned with any finding regarding Laws.

Your responsibility, your central responsibility is to determine whether Harry Hackett is guity or not guilty of any one of these five counts that I am about to read to you.

In determining his innocence or guilt, you must bear in mind that guilt is personal. The guilt or innocence of Harry Hackett, the defendant on trial before

you, must be determined on the basis of the evidence presented against him or the lack of evidence.

Now let me read the conspiracy count and then I will explain it. The conspiracy count reads as follows:

From on or about the 1st day of April 1974 and continuously thereafter, up to and including the date of this indictment, in the Southern District of New York, Harry G. Hackett, Jr., Leon S. Laws and Richard B. Johns, the defendant, and others to the grand jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)1 and 841(b)1(a) of Title 21, United States Code.

It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute schedule two narcotic drug controlled substances, the exact amount thereof being to the grand jury unknown, in violation of Sections 812, 841(a)1 and 841(b)1(a) of Title 21 United States Code.

Then there is a space and there is a caption that reads "Overt Acts".

In pursuance of said conspiracy and to effect the objects thereof, the following overt acts were committed

in the Southern District of New York.

I will read those overt acts to you in a moment when I get to explain what we mean by overt acts and why they are in there, but let me explain the law of conspiracy, apart from the question of overt acts, because I think if I break it up it will be a little bit easier for you to understand.

There are three essential elements of the conspiracy charge. The government must prove each of these elements beyond a reasonable doubt and if you have a reasonable doubt with respect to any one of these elements, it is your duty to acquit the defendant.

If it succeeds in proving these elements beyond a reasonable doubt, it is your duty to convict the defendant.

What are these three elements?

First. That sometime between approximately April 1, 1974 and October 7, 1974, the date specified in the indictment, an agreement or understanding existed between the named conspirators to commit the crime charged in the indictment, to wit, the illegal distribution of a federally controlled substance, namely, cocaine, in New York City.

In short, the government must prove that the conspiracy existed with respect to the distribution of

cocaine.

Second. That the defendant Hackett knowingly and wilfully became a participant in the conspiracy with knowledge of at least one of its criminal purposes.

Third. That one of the conspirators, and not necessarily the defendant on trial, knowingly committed at least one of the overt acts set forth in the indictment at or about the time alleged in furtherance of the conspiracy.

Now, what is a conspiracy? The word comes from two Latin words, con and spirare meaning to breathe together. It literally means a breathing together.

It is a combination, agreement or understanding of two or more persons to accomplish criminal purposes. In this case the government contends the purpose of the conspiracy was to violate the law with respect to the possession of narcotic drugs with intent to distribute them.

The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law and it does not matter whether or not it succeeded.

Conspiracy has sometimes been called a partnership in criminal purposes in which each member becomes the

agent of every other member. To establish a conspiracy the government is not required to show that two or more persons sat around a table and entered into a solemn or formal pact orally or in writing stating that they formed a conspiracy to violate the law.

Indeed, it would be extraordinary if there were ever such a formal document or a specific oral agreement.

From its very nature a conspiracy is almost invariably secret in its origin and in its execution.

Express language or specific words are not required to indicate assent or attachment to a conspiracy. When persons in fact undertake to enter into a criminal conspiracy, much is left to unexpressed understanding.

The adage, actions speak louder than words is applicable here. You must first determine whether or not the proof establishes the existence of the conspiracy as charged in the indictment. In deciding this first element it is sufficient if two or more persons in any manner through any contrivance impliedly or tacitly come to a common understanding to violate the law.

Express language or specific words are not required to indicate assent or attachment to a conspiracy.

Proof concerning the accomplishment of the

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objects of the conspiracy may be the most persuasive evidence of the existence of the conspiracy itself.

Success of a venture, if you believe it was successful or in part successful, may be the best proof of the existence of the agreement. In determining whether the conspiracy charged in the indictment actually existed, you may consider the evidence of the acts and conduct of the alleged conspirators as a whole and the reasonable inferences to be drawn from such evidence.

If upon such consideration of the evidence you find beyond a reasonable doubt that the minds of Harry Hackett and at least one of the other alleged conspirators Leon Laws or Richard Johns met in an understanding way and that they agreed as I have explained to work together in furtherance of the unlawful scheme alleged in the indictment, then proof of the conspiracy is complete.

If you do conclude that a conspiracy as charged did exist, you must next determine the second element, whether the defendant Hackett was a member.

You will determine this from all the proof in the case. However, in so doing you should consider all the evidence, that is, the acts and statements of the defendant as well as the acts and statements of the other

co-conspirators or persons you find were co-conspirators.

I might interject here a respectful suggestion that I think the evidence is fairly clear and persuasive that something was going on by somebody in connection with the sale or distribution of cocaine or marijuana or both. I do not see how on the basis of the evidence here you can escape the fact that there was some kind of an enterprise by somebody engaged in this activity.

The hardcore issue in the case, I suggest to you, is whether or not the defendant Hackett was a participant in this conspiracy, whether the defendant Hackett was a member of this conspiracy. That is the element that I am now seeking to explain.

Incidentally, you need not find that Hackett conspired with both Laws and Johns. It is enough that you find that Hackett conspired with either one, but unless you find that two conspired, there can be no conviction on the conspiracy count since it requires at least two persons to make a conspiracy.

Mere association of a defendant with an alleged co-conspirator does not establish his participation in the conspiracy even if you find that one did exist.

And, so, too, mere knowledge by a defendant of a conspiracy or the illegal act on the part of another

co-conspirator is not sufficient to establish membership. To find a defendant guilty of the conspiracy you must be satisfied beyond a reasonable doubt that he knowingly and wilfully joined the conspiracy with the intent and purpose of furthering its object, namely, to distribute or to possess with intent to distribute a narcotic drug controlled substance, namely, cocaine.

The question of intent is one of fact and clearly this concerns what is in one's mind and the purpose which motivates a person in his course of conduct.

Medical science has not yet devised an instrument to record criminal or wilful intent. It is a mental process and attitude. Usually direct proof of it is not available. Intent and motive are determined from the acts, conduct and circumstances and such reasonable inferences which may be drawn therefrom.

If you find the circumstances of secrecy, intrigue, deviousness or attempts to conceal by false statements or otherwise the real nature of the transaction, you may consider these elements, along with other evidence in the case, as showing consciousness of guilt.

Before considering the element of overt acts, which I will come to in a moment, there is another

principle of law of conspiracy which you should bear in mind. When persons enter into a conspiracy to accomplish an unlawful end, each becomes an agent for all the others in carrying out the unlawful conspiracy.

Hence, the acts and declarations of one conspirator in the course of the conspiracy and in furtherance of the common purpose are deemed to be the acts and declarations of all and all are responsible for such acts and declarations.

Accordingly, if you find in accordance with these instructions that the alleged conspiracy existed, then acts done and statements and declarations made in furtherance of the conspiracy by any one conspirator may be considered against the others even though such acts and declarations were made in the absence and without the knowledge of the conspirator who was not present.

It is not required that the co-conspirators know each other. They may not have been associated together previously. Indeed, it may be that a defendant may know only one other member of the conspiracy. But if he enters into an unlawful agreement with that other member of the conspiracy, he becomes a party thereto.

end take

T 2 pm

The question here is: Did the defendant whose guilt you are evaluating, namely, Harry Hackett, join one or more others in the conspiracy with an awareness of at least some of its basic purposes and aims? If so, then the law treats him as a full member of the conspiracy and he becomes liable for the acts of all the other conspirators. Thus, if you find that Harry Hackett is a conspirator, then, however limited his role in furthering the objectives of the conspiracy, he is responsible for all that was done in furtherance thereof during its continuance.

To summarize, you must first decide whether the independent proof convinces you beyond a reasonable doubt that the defendant was a member of the conspiracy during a given period of time. If you have such a conviction as to the defendant then and then only then you may take into account statements made during or prior to the time of his membership by his co-conspirators provided that you also find that such statements were made with the intent of advancing the objects of the conspiracy.

If you are able to satisfy yourselves on both of these points, you may use the words of co-conspirators for whatever they tend to prove as to any of the criminal activities with which the defendant is charged.

You will recall, ladies and gentlemen, that in

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the early stages of the case you heard testimony from Officer Newton with respect to those conversations with Richard Johns and the statements by Richard Johns was making about Harry. You didn't know what Harry was being referred to and you couldn't know. At that point you may very well have asked yourselves, and I believe Mr. Ullman registered an objection to the testimony, and I said it was being taken subject to connection with other evidence in the case.

On the basis of all the evidence, if you accept the arguments of the government you could find that Johns was indeed connected with Hackett and was a member of the conspiracy, acting in furtherance of its objectives, so that if that was the case, if you believed beyond a reasonable doubt that that was the case, then, you see, his actions and his words would be binding upon another member in this case. It was suggested Hackett was the other member, even though Hackett wasn't there to hear him and even though Hackett was nowhere around.

The idea, basically, is that if they are members of the same conspiracy and they are acting to further its aims, each one becomes the agent of the other.

As I have already mentioned, the third essential element of the crime of conspiracy is that of the commission of an overt act. Let me read the overt acts to you first.

mch 3

"In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

"1. On or about June 26, 1974, defendant Richard Johns had a telephone conversation with an undercover agent.

"2. On or about June 26, 1974, defendant Richard Johns entered the premises at 230 Riverside Drive, New York, N.Y.

"3. On or about June 26, 1974, defendant Richard Johns left the premises at 230 Riverside Drive, New York, N.Y. and delivered a package containing cocaine to an undercover agent.

"4. On or about July 23, 1974, defendant Richard Johns met an undercover agent in front of 230 Riverside Drive, New York, N.Y. and had a conversation.

"5. On or about July 23, 1974, defendant Harry Hackett, Jr. signalled to defendant Richard Johns and both of them entered the premises at 230 Riverside Drive, New York, N.Y.

"6. On or about July 23, 1974, defendant Leon Laws entered 230 Riverside Drive, New York, N.Y. carring a blue suitcase.

"7. On or about July 23, 1974, defendant Richard Johns left the premises at 230 Riverside Drive and delivered

a package containing cocaine to an unde cover agent.

"8. On or about July 23, 1974,defendants Harry Hackett, Jr. and Leon Laws possessed cocaine in apartment 10A at 230 Riverside Drive, New York, N.Y."

Then there is a reference to Title 21 of the United States Code, Section 846, pursuant to which this charge was drawn.

Now, to effect the object of the conspiracy an overt act must be committed by at least one of the co-conspirators after the unlawful agreement has been entered into. An overt act is any step, action or conduct which is taken to achieve, accomplish or further the objective of conspiracy. The purpose of requiring proof of one overt act is that while parties might conspire and agree to violate the law, they may change their minds and do nothing to carry it into effect, in which event it wouldn't constitute an offense.

The overt act need be neither a criminal act nor the very crime which is the object of the conspiracy. It need not be committed by the particular defendant whose guilt is under consideration.

As you have probably noticed, some of these actions were not in and of themselves of a criminal nature. Two persons entering a premises at such and such a place or

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somebody having a conversation. Those acts, in and of themselves, need not be of a criminal nature, but they must be in furtherance of a conspiracy and accomplished by a member of the conspiracy.

It is not necessary for the government to prove that each member of the conspiracy committed or participated in any particular overt act, since the act of any one done in furtherance of the conspiracy becomes the act of all the other members. Thus the government need not show that Harry Hackett, Jr. committed or participated in any particular overt act, so long as it shows the commission or participation in an overt act of any of the other alleged conspirators.

Also, the government is not required to prove each of the overt acts. It is sufficient if it proves the commission of at least one of the acts set forth in the indictment at or about the time alleged.

So that although I read eight of these overt acts, it is sufficient if you find one of them, if that is your conclusion. The overt act need not have occurred at the precise time or the precise place as alleged therein.

So too, while the indictment alleges that the conspiracy began on or about April 1, 1974, and continued to through on or about October 7, 1974, it is not essential for the government to prove the conspiracy started and ended

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on or about those specific dates. It is sufficient if you find that in fact a conspiracy was formed and existed for some period of time within the period set forth in the indictment and that at least one of the overt acts was committed during that period.

I respectfully suggest that the conspiracy so far as the evidence in this case is concerned came to an end at the time of the arrest on July 23, 1974.

Thus, in order to prevail under the conspiracy count, the government must establish beyond a reasonable doubt the existence of the unlawful agreement, that the defendant Hackett knowingly and wilfully participated in the conspiracy and the commission by one of the conspirators of at least one overt act in furtherance thereof. If the government succeeds, your verdict should be guilty, and if the government fails your verdict should be not guilty.

b2 You know when I was a law student and I first heard my professors in law school explaining conspiracy I was a little confused, and the more cases I read the more confused I got. After a while I tried to think of something that would clarify this concept in my mind and I'm giving it to you for what it is worth. It occurred to me that a conspiracy was a little bit like a merry go round that is operating, that is a circular platform that has a lot of

objects on it. Then generally there is a wide central turret in which there is machinery that makes it revolve. You can conceive of this moving platform as the basic agreement, the criminal conspiracy, the partnership in crime, and you can conceive of the co-conspirators as persons who get on this moving platform at different times, perhaps at opposite sides from each other where one doesn't see what the other is doing and one doesn't hear what the other is saying, but as long as they are standing on this platform, this agreement, and it is a going enterprise, each one doing something to further its operation, then you have a participation in the conspiracy. Then, if you have an overt act in furtherance of the conspiracy you have what the law requires. Of course, you have to find these elements beyond a reasonable doubt and your failure to find any one of them beyond a reasonable doubt is sufficient to warrant a verdict of acquittal. But I convey to you this concept of the moving merry go round as a convenient way of envisaging what I have explained.

Now, count 2 is the first of the substantive counts that I have already referred to and I will read that to you first. It reads:

"The Grand Jury further charges:

"On or about the 26th day of June, 1974, in the

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Southern District of New York, Harry G. Hackett, Jr. and Richard D. Johns, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 24.75 grams of cocaine hydrochloride."

Then there is a reference to the law from which this is drawn.

Before you may find the defendant Hackett of this second count you must be satisfied beyond a reasonable doubt of the following essential elements and your failure to be so satisfied with respect to any one of them would require you to acquit the defendant:

First: That on or about June 26, 1974, Harry G. Hackett distributed and possessed with an intent to distribute the alleged cocaine which was admitted into evidence as Government Exhibit 3.

Second: That Hackett did so unlawfully, wilfully and knowingly. This means that you must be satisfied that Hackett knew w[illegible]e was doing and he did so deliberately and purposely as opposed to mistakenly or inadvertently; that he did so with the specific intent to distribute or possess with intent to distribute a narcotic drug controlled substance, namely cocaine, and that he did so with an evil motive or a bad purpose, that is, with an intent to distribute

this substance.

Now, it is not necessary to find that he knew about the statute we have been talking about, but simply that he knew what he was doing.

Third: That the alleged substance in Exhibit No. 3 is in fact cocaine.

First let me allude to the phrase possession with intent to distribute. Possession in the law means simply to have control or dominion over something. Possession may be of two types, actual or constructive. Actual possession means that the defendant knowingly has personal, manual or physical control of the drug. Constructive possession means that, although the drugs are in the physical possession of another person, a defendant knowingly has the power to exercise control over them or to cause their delivery. Either type of possession may be proved by direct or circumstantial evidence or by a combination of both.

The word "intent" refers to a person's state of mind. The word "distribute" means the actual, constructive or attempted transfer of the drug.

So the term "possess with intent to distribute" can be fairly stated to mean: to control an item with the state of mind or purpose to transfer that item.

Now, with respect to this requirement, the

government contends that the evidence shows that Harry Hackett actually transferred control of the cocaine to Richard Johns who, in turn, sold the cocaine to Officer Newton and Officer Feurtado here in Manhattan.

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The defendant, on the other hand, contends by his plea of not guilty, by the arguments of his counsel and on the basis of the evidence reviewed by his counsel that he did not participate in any narcotic transactions with Johns. It is up to you ladies and gentlemen to make that important determination.

As to the third element, the indictment charges that the narcotic drug controlled substance is cocaine. I instruct you as a matter of law that cocaine is a narcotic drug controlled substance. However, you must still find a reasonable doubt that the substance in Government Exhibit 3 is cocaine.

I respectfully suggest, ladies and gentlemen, that you should not have any trouble coming to that conclusion in the light of the testimony of the chemist and other testimony in the case which will permit you to draw the inference that it is indeed cocaine. However, I again charge you that it is your duty to find beyond a reasonable doubt that it is cocaine and that is one of the three essential elements that is charged. So much for count 2.

Let's look at count 3. I will read count 3 first, and it reads as follows:

"The Grand Jury charges:

"On or about the 23rd day of July, 1974, in the Southern District of New York, Harry G. Hackett, Jr., Leon Laws and Richard Johns, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 54.18 grams of cocaine hydrochloride."

Then there is a reference to the law from which this charge is drawn.

Before you may find the defendant guilty on the third count, which I have just read to you, you must be satisfied beyond a reasonable doubt of the following essential elements: If you fail to be satisfied beyond a reasonable doubt with respect to any one of these elements it would then be your duty to acquit the defendant.

First: That on or about the 23rd of July, 1974, Hackett possessed with intent to distribute or distributed the alleged cocaine which was admitted into evidence as Government Exhibit 4. This exhibit, you will recall, is the approximately two ounces of cocaine that Richard Johns allegedly attempted to sell to the undercover officers on July 23rd outside of 230 Riverside Drive and which Johns claims

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he received from Hackett.

Second: That Hackett did so unlawfully, wilfully and knowingly. This means, as I told you with respect to count 2, that you must be satisfied beyond a reasonable doubt that Hackett knew what he was doing and that he did so deliberately and purposely as opposed to mistakenly or inadvertently; that he did so with the specific intent to distribute or possess with intent to distribute a narcotic drug controlled substance, namely cocaine, and that he did so with an evil motive or a bad purpose. It is not necessary to find that he knew about the statute we have been talking about here, but simply that he knew what he was doing.

The third essential element is that the alleged substance in Exhibit 4 is indeed cocaine.

I repeat what I said before regarding this being cocaine and I respectfully suggest that you should have no difficulty arriving at the conclusion that it is indeed cocaine. However, it is our duty and your duty alone to come to that conclusion beyond a reasonable doubt on the basis of the evidence in the case.

Now, let's look at count 4, which reads as follows:

"On or about the 23rd day of July, 1974, in the Southern District of New York, Harry G. Hackett, Jr. and Leon S. Laws, the defendants, unlawfully, wilfully and

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knowingly did possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 4.77 grams of cocaine hydrochloride," and there is a reference to the law from which it is drawn.

Before you may find the defendant Hackett guilty of the fourth count you must be satisfied beyond a reasonable doubt of the following essential elements:

First: That on or about July 23, 1974, Hackett possessed with intent to distribute the alleged cocaine which was admitted into evidence as Government Exhibits 6 and 8. Exhibit 6, you will recall, is the cocaine allegedy found on the scale, and 8 is the cocaine found in four vials in the bedroom dresser, according to the testimony of Detective Stanley.

Second: That Hackett did so unlawfully, wilfully and knowingly and did so with the specific intent to possess with intent to distribute a narcotic drug controlled substance, namely cocaine.

Third: That the alleged substance in Exhibits 6 and 8 is in fact cocaine. I repeat there again what I have said regarding the nature of the substance with respect to counts 3 and 4.

Now, the last count, which is count 5, reads as follows:

"On or about the 23rd day of July, 1974, in the Southern District of New York, Harry G. Hackett, Jr. and Leon S. Laws, the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately 871.96 grams of marijuana."

Before you may find the defendant Hackett guilty of the fifth count you must be satisfied beyond a reasonable doubt of the following essential elements, and I repeat, if you have a reasonable doubt with respect to any one of these elements it is your duty to acquit.

The essential elements are as follows:

First: That on or about July 23,1974, Hackett possessed with an intent to distribute the alleged marijuana which was admitted into evidence as Government Exhibit No. 15. That is this cloth suitcase. The cloth suitcase, according to the evidence before you, contained two bags of marijuana.

Here the government claims that the defendant Hackett had constructive possession of the alleged marijuana at the time of his arrest and that he intended to distribute it.

Second: That Hackett did so unlawfully, wilfully and knowingly and with the specific intent to distribute a controlled substance, namely marijuana.

Third: That the alleged substance in Exhibit No. 15 is in fact marijuana.

As to the third element, the indictment charges that the controlled substance is marijuana. I instruct you as a matter of law that marijuana is a drug controlled substance. However, you must still find beyond a reasonable doubt that the substance in Government Exhibit 15 is marijuana.

b4 Now, you heard a number of witnesses in this case. The first witness was a police officer, Eddie Newton, who acted as an undercover agent. Then Richard Johns, a co-defendant who has pleaded guilty and about whom I will speak in greater detail later. Then Kendall Feurtado another police officer who acted with Newton as an undercover agent and pretended to be an associate of Newton in his undercover capacity, Detective Ronald Stanley, Police Officer Gary Kuramoto, the chemist, Jack Fasanello, Robert Holcomb and Daniel Pykett, the Assistant U.S. Attorney who took a statement of June Murphy, the friend of defendant Harry Hackett.

The defendant called Steven Stewart, June Murphy, Harry Thomas, and two character witnesses, Alexander Aikens and Edward Hull.

You are the sole judges, ladies and gentlemen,

of the credibility of all the witnesses who have testified in the course of this trial. It is up to you and you alone to give to the testimony of the witness the weight that you think it deserves, and that function applies as well to every exhibit in the case. And that gives you a measure of the tremendous responsibility that the law places in your hands.

It is up to you to decide whether the truth lies. It is up to you to decide the probative value or significance of that truth as you find it.

One of the precious gifts that you bring to the courthouse is that you were drawn from different walks of life with varying experiences and perhaps with some pretty important and perhaps terrifying decisions that you have had to make in your lives, all of which have helped you to form a capacity for judgment, for judgment of other persons, for judgment of events. That is the precious gift that you bring to the courthouse, this judgment which, I repeat, should be objective, unprejudiced, based solely upon the evidence and it is subject to the law as I charge.

You should consider the inherent probability of what each witness testified to. Consider the demeanor of the witness on the witness stand. That is why the witness chair is placed where you can see the witness in addition to hearing

him. Consider the force and effect of contradictory statements, if there were any. Sometimes a person will contradict himself out of clumsiness, out of an aberration of memory, out of a failure to be articulate. Other times he will contradict himself because he is tilting with the truth. He is not frank. He lacks candor.

That doesn't mean that the witness who is straightforward and logical is necessarily telling the truth. He may be just as logical as any person can be, just as articulate as it is possible to be, and he may be lying.

On the other hand, a clumsy, inarticulate witness may nevertheless tell you the truth. That is what so important about your judgment, about your careful attention to the evidence.

Consider the interest of the witness in testifying as he did. Consider whether that interest, if there was any, can really be taken as evidence to the point where you really have to reject or at least really attribute only a slight significance to it. Remember that it is the quality, not the quantity of the evidence that is important. Under our law one man can stand against a whole room full of exhibits, against a whole room full of witnesses if you believe he tells the truth and the other witnesses and the exhibits do not.

What do you do with a witness whom you believe has

been guilty of wilful falsehood or lying on the witness stand? You can do one of two things: You can either accept that portion of his testimony which you believe to be credible and reject the part which you believe to be tainted by the untruth, or you can reject it all. It is a little bit like a person eating a fruit which appears to be wholesome and sound and then suddenly discovering an imperfection that he didn't notice before. Some people will simply reject the whole fruit. Others will eat the part that is edible and untainted and reject only the part that is tainted. That is about the same as the law says you should so do with the testimony of a witness if you believe he is lying on the witness stand.

If you believe that the testimony is so thoroughly tainted by falsehood that none of it is worthy of belief, you should reject all of it. If you believe that only part of it is tainted and part of it is credible, then you can accept the part that is credible and reject only the part that is tainted.

In determining whom you will believe and what weight you will give to the testimony of the witnesses, consider the nature of the evidence given by them, their bias or prejudice, if any has been disclosed, their opportunity to know and remember the facts about which they

testified, their manner and deportment while on the witness stand, their candor or frankness or lack of it, their interest, if any, in the result of the trial, the extent to which they are corroborated or contradicted by other proof; the probabilities, as indicated by your common sense and sound judgment, that the things asserted in their testimony actually existed or occurred; such acts as from the evidence aid you in determining the extent to which the testimony is worthy of belief.

You should ask yourselves, as to each witness, what interest or motive that witness may have to testify in a particular manner. If you determine that any witness has a motive or interest which might have led him to testify falsely ask yourself, did he do so or did he tell the truth, notwithstanding the motive or interest. Even if you do not doubt the good faith of the witness, you should look out for circumstances which might lead to inaccurate testimony such as faulty memory or inadequate perception, and throughout this process you will be using your common sense and understanding to assign to the testimony of each witness the value and weight which best appeals to your sound judgment.

Now, you have heard evidence to the effect that Mr. Hackett was in an apartment at 230 Riverside Drive at a time when the narcotics transaction allegedly took place.

I instruct you as a matter of law that mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that Mr. Hackett committed the crime charged herein, unless you find beyond a reasonable doubt that Mr. Hackett was a participant and not merely a knowing spectator.

Let me turn to this prior conviction that Mr. Ullman referred to in his opening and which has been brought into the case by Exhibit 33 which in effects says that on the 30th day of July, 1973, Harry Hackett pleaded guilty to the offense of possessing with intent to distribute cocaine in violation of certain laws of the United States.

It has been conceded incidentally by Mr. Pedowitz that the facts which underlie this conviction occurred in November 1969.

Now, why was this brought into the case at all? It does not prove any of the crimes that are charged in the five counts of this indictment. Why was it brought in?

This evidence was received and you may consider it only for the limited purpose of showing Hackett's motive, intent, inclination, purpose or associations.

Evidence that an act was done at one time or on one occasion is not any proof whatever that a similar act was done at another time and on another occasion.

That is to say that evidence that the defendant may have committed an earlier act of like nature may not be considered in determining whether the accused committed any of the crimes charged in the indictment.

Nor may the evidence of the alleged earlier act of a like nature be considered for any other purpose unless you first find that the other evidence in the case standing alone establishes beyond a reasonable

doubt that the accused did the particular acts charged in the particular count of the indictment under deliberation.

If you find beyond a reasonable doubt from other evidence in the case that Hackett did the acts charged in the particular count under deliberation, then you may consider evidence of this earlier act of the like nature in determining his state of mind or intent.

In other words, the state of mind or intent with which he did the acts charged in the particular count of the indictment.

Where proof of the alleged earlier act of a like nature is established by evidence which is clear and conclusive, and in this case there can be no question because it is practically conceded by both sides that there was this prior conviction, the jury may draw therefrom the inference that in doing the acts charged in the count of the indictment under consideration the accused acted wilfully and with specific intent and not through mistake or inadvertence or illicit reason.

I stress that it is within your power to do so, not your obligation to do so. I repeat: You

may draw therefrom the inference that in doing the acts charged in the count of the indictment under consideration Hackett acted wilfully and with specific intent and not through mistake or inadvertence or innocent reason.

Remember that the administration of our system of criminal justice and our basic concepts of fair dealing are centered on the requirement that in each case the jury reach a result based solely on the charges made in the particular indictment and on the evidence which appears on the record with regard to those charges in the indictment which I read to you.

I wish to caution you that this prior act, this prior cocaine conviction, does not prove any of the offenses charged in this indictment.

It may be considered by you solely for the purposes which I have outlined.

I am sorry to take so long, ladies and gentlemen, but I have had a great deal of ground to cover and I am hoping that perhaps I can shorten some of the rest of it.

There is circumstantial evidence in this case and I think I should define it for you. Circumstantial evidence is presented to you whenever you are supplied with the facts from which you are asked to deduce that

other facts also exist. You are permitted to resolve disputed questions of fact on the basis of direct evidence and circumstantial evidence or both. The testimony of an eyewitness based upon knowledge acquired as a result of actual or personal observation is direct evidence of what the witness observed.

Evidence of facts which allow you based on your common experience to deduce or conclude that other facts or events occurred is termed circumstantial evidence.

Circumstantial evidence is proper and competent proof. Circumstantial evidence appeals to the common sense and common experience of mankind and these teach us that the known existence of some facts necessarily implies that other facts connected with them exist.

Sometimes circumstantial evidence is even more convincing than direct evidence because direct evidence may depend upon the memory or observation and truth of one witness while circumstantial evidence may be based upon the memory, observation and truth of many witnesses who concur and agree or upon physical facts which cannot be mistaken and cannot speak falsely.

Let me turn for a moment to a consideration of the position of the witness Richard Johns about whom so much has been said in this case both during the trial

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and during the summations of counsel.

The witness Johns, otherwise referred to as Dickie, called by the government, has told you that he and the defendant Harry Hackett concurred in the commission of the offenses charged in this indictment or at least in those counts of the indictment in which he is named. That would be Counts 1, the conspiracy count, Count 2, the reference to June 26th, and Count 3, the reference to the alleged transaction of July 23rd.

Now, in asserting that he and the defendant Hackett were confederates in the alleged crimes charged in those counts, he has acknowledged himself to be in legal terminology an accomplice and you should scrutinize his testimony carefully remembering that the function of determining his credibility lies entirely with you. In performing this important function it may assist you to bear in mind the following considerations:

First. The fact that a person has confessed the commission of a crime does not render him unable to tell the truth or to recount with accuracy the events which occurred.

Two. Indeed if you assert in your own minds that he is telling the truth, he told you the truth during this trial, a conviction on the basis of his testimony

alone would be entirely proper.

Three. However, it is sometimes true that a confederate who acknowledges his share in crime may hope to escape a harsh sentence by assisting the government in procuring the conviction of another.

In this connection you should remember that he has acknowledged his guilt and has pleaded guilty to one of the counts in this indictment. The sentence has not yet been imposed upon him; that he hopes that that sentence will be lenient.

You may also consider that he has no control over what that sentence will be. That sentence is entirely a matter for the Court to determine and that his hopes for leniency may not be realized.

You have been advised by Mr. Pedowitz that at the time of sentence the other two counts to which he did not plead will be dismissed.

In sum, you should ask yourselves whether or not under all of the circumstances put before you you are confident that Richard Johns spoke the truth so that you may act upon the testimony which he has given you.

Now, Mr. Ullman when he summed up this morning attacked Johns as an out and out perjurer and liar

and said he didn't want to go to jail and he gave them Harry. I think those were the exact words he used.

Now, ladies and gentlemen, if you believe that Johns was trying to frame an innocent man in this courtroom and that he lied to you for the purpose of escaping punishment himself, then do not hesitate to reject all of his testimony. If you reject all of his testimony, I instruct you to acquit the defendant Hackett with respect to the second count of this indictment.

There would not be, in the event you rejected all of his testimony, there would not be sufficient evidence to sustain a conviction of the defendant Hackett on that count.

But let me warn you, too, that you are free to pick and choose among this evidence the parts and pieces that you think are credible and to reject the parts and the pieces that you think are not credible.

In other words, you do not have to accept all that he testified to. You do not have to reject all that he testified to. It is not all black and white. You can, if you wish, and this is entirely within your discretion, accept a portion of his testimony or the testimony of any other witness and attribute to that portion which you accept the probative value which you think it

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deserves.

Now, there has been testimony in this case concerning certain statements made by the defendant Hackett to arresting officers and to an assistant United States attorney. If you find that the defendant Hackett did make the statements, you may give those statements such weight as you believe they deserve under all the circumstances which were brought out in the evidence.

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something or has failed to say or do something which is inconsistent with the witness' present testimony. If you believe any witness has been impeached and discredited in the manner just described, it is your exclusive province to give to the testimony of that witness that degree of credibility, if any, which you think the witness deserves.

Now, I would like to allude to the tape recordings. During the course of this trial several tape recordings have been admitted into evidence as well as several transcripts which purport to reflect the conversations on the recordings. You have heard testimony that these tapes were prepared by government agents with the consent of one or more police officers who were

parties to the conversations.

Two recordings, Exhibits 30 and 31, were obtained with the consent of Police Officer Newton. The conversation in the car, in the government car that was parked outside of 230 Riverside Drive, Exhibit 32, was taped with the consent of Police Officers Newton and Feurtado and the conversation between Police Officer Stanley, Detective Stanley and Mr. Johns, Defense Exhibit B, was taped with the consent of both parties. The taping with the consent of one or both of the parties to the conversation is permitted by law. Consent recordings are commonly used by law enforcement personnel to obtain evidence.

I instruct you that the primary evidence of the conversations that were recorded is the testimony under oath of the witnesses who have appeared before you. The primary evidentiary function of the recordings and the transcript is to corroborate or dispute, as the case may be, the testimony of the various witnesses.

The primary function of Exhibits 30, 31 and 32 was to corroborate the testimony of Police Officer Newton and Mr. Johns.

Exhibit B, which was put in evidence by Mr. Ullman on behalf of Mr. Hackett, was attacked by Mr.

Ullman in his summation on the ground that it had at least five interruptions and he suggested to you that because of those five interruptions you could not credit what was said during the part that was in fact recorded. It is up to you, ladies and gentlemen, to attach to these conversations the degree of credibility which you think they deserve.

Remember that the basic testimony, the basic evidence upon which your conclusion rests is the testimony under oath of the witnesses who have appeared before you.

The recordings and transcripts are to be considered by you as aids to your understanding of the content of the conversations that were testified to here.

You will recall that Officers Newton and Feurtado both testified that they posed as underworld characters and I apologize for using the word, but they testified that they were acting as pimps dealing on the side in cocaine.

Throughout their relationship with the co-defendant Richard Johns and until the time of his arrest, they persisted in this undercover capacity and in conveying the idea even to the extent of simulating the snorting of cocaine on one occasion, that they were indeed what they said they were, pimps dealing in cocaine on the

side.

You will recall that the charade or undercover act went as far as a simulated arrest of the two police officers themselves at the time Johns was arrested.

Now, the use of guile, artifice and strategem, the use of a false identity by Officers Newton and Feurtado was permissible under the law. These are permissible methods available to law enforcement officers to discover violations of law, such as those alleged to have occurred here.

You can be sure and I think that it requires no comment by anyone to you to emphasize the fact that if drug enforcement agents were to appear with a neon sign on their cars indicating this car belongs to the Drug Enforcement Agency stationed in New York City and they had big badges which said, we are drug enforcement agents, that they would be very seriously impeded if not completely frustrated in the enforcement of the drug laws and the Federal Narcotics Laws.

These methods, if they were not available to the government, would make it often impossible to obtain convictions in cases involving criminal transactions which are carried on in secrecy.

I apologize again particularly to the ladies

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on the jury for all the obscenities and for all the vulgarisms that were contained in these tapes, but it is part of the fabric of the evidence in the case and I ask you not to shrink from it just because there is something disagreeable to look at.

Now, there was evidence in this case given by two of the defendant's witnesses as to his good character. Good character is to be weighed as a factor in the defendant's favor. You should consider it together with all the facts and circumstances which have been put before you and then give it the weight to which you think it is entitled.

A defendant is not entitled to a verdict of acquittal simply because he possessed a good reputation for honesty or obedience to the law before the indictment.

However, when considered along with all the other evidence the defendant's reputation, like other factors in his favor, may generate a reasonable doubt as to his guilt.

If, after considering all of the evidence introduced in this case, including the evidence of the defendant's reputation for good character, you have a reasonable doubt in your minds with respect to any of the counts of this indictment, you should acquit the defendant.

You should return a verdict of guilty only if you are convinced on the basis of all the evidence, including the evidence of the defendant's reputation for good character, that the charge against the defendant has been proved beyond a reasonable doubt.

Now, the defendant did not take the witness stand or testify in his own behalf. I instruct you that you are to draw no adverse inferences from this. Our Constitution guarantees to the defendant the right to remain silent throughout the trial and you are not to let his exercise of this right influence you in your determination of his guilt or innocence.

You should not speculate as to the reasons for a defendant's failure to testify nor should you permit this matter to enter into your appraisal of the evidence in any way.

If you fail to find beyond a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of acquittal.

On the other hand, if you should find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

Upon your oaths as jurors you cannot allow

consideration of the punishment which may be imposed upon the defendant in the event of conviction to enter into your deliberations or to influence your verdict in any respect.

The duty of imposing sentence in the event of conviction rests squarely upon my shoulders. It is a heavy responsibility for the Court, but you should not be concerned with it in any way.

Your verdict should be unanimous, but it should represent the conscientious determination of each and every one of you.

The essence of the jury function is conscientious listening and conscientious explaining. You should be anxious and willing to explain your point of view. You should be anxious and willing to listen to the point of view of your fellow jurors.

You should do this without fear and without favor, without prejudice remembering that a trial is and should be a conscientious search for the truth. Only the truth should triumph.

This is not a battle of wits. This is not a contest in elocution or in salesmanship. It is an attempt to search out and to affirm the truth as it occurred on the basis of the evidence in this case subject

to the rules law as I have charged you.

Try to start with facts that you consider to be easy to resolve and that you consider perhaps as undisputed. Then work from those facts to the more troublesome aspects of the case.

Rely upon your recollection of the facts remembering that if you want any part of the testimony read, it can be read to you in open court.

If any part of my charge proves to be confusing or difficult for you when you are working with the case, please ask me to explain it or amplify it for you and I shall be delighted to do so since I will be at your service throughout your deliberations if you require help.

If you wish any of the exhibits, they will be sent in to you.

Please do not give yourself legal advice. Please do not speculate evidence into the case.

You must not be swayed by sympathy or emotion. There have been, unfortunately, appeals to your sympathy or emotion. You should reject them. They cannot help you to discharge your duty in this case.

A reference was made during the summation of counsel to a television program and I do not know whether

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that program contained a trial or just a police investigation, but whatever it may be, one of the problems with thinking of trial or police investigations when they are offered as entertainment is that they are there for the purpose of inspiring you and instigating you into guessing things.

Who did this or who did that or who was there and so forth and you are trying to solve a puzzle on the basis of what you can think up, what you can imagine. A trial as entertainment in the theatre is almost a guessing game. That would be the worst kind of exercise for you to engage in, ladies and gentlemen.

Remember that the evidence is before you and it is on that evidence, that evidence alone, which must constitute the basis for your judgment. You should not speculate evidence into the case.

You are not here to solve a riddle. You are not here to supply missing links. You are here, however, to judge the evidence before you and to draw from that evidence the inferences or conclusions which appear to you to be reasonable and sound.

Your verdict should be unanimous and the unanimity requirement applies to each and every one of the counts. You may find the defendant guilty or not guilty

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on any one or all of the five counts before you.

Your verdict should be unanimous with respect to each one of the counts.

Now, I want to thank the alternate jurors for their kindness and attention and as soon as the jury is permitted to retire to consider its deliberations, those jurors can take their wraps or other property out of the jury room and leave and they can consider themselves to be excused until such time as the clerk advises them that their services are no longer needed. I do not know whether you will be required to attend for other cases or not, but I want to thank Mrs. Ficcola and Mr. McMorrow for their careful attention and conscientious attendance at the case. You guaranteed the continuity of the case and its conclusion and for that you are entitled to my very sincere thanks which I am glad to extend to you.

To those jurors who took notes at times during the trial, may I remind you that you should keep those notes in your pocket and not use them as means of persuading anybody that you are right. If you do get to the point where there is a disagreement as to what precisely took place during the trial, please refer to the record and not to your notes.

I think I have said all I want to say, but

there is just one additional peripheral matter I have got to refer to, ladies and gentlemen. I am sorry to take your time about this, but it was stated to me just before I gave you the charge this afternoon that the witness Thomas, who appeared here in behalf of the defendant, at some point during a recess yesterday stopped in the hallway to greet one of the jurors.

If the juror whom he greeted would please let me talk to him before the deliberations, I would appreciate it because there may be some question as to whether that juror should sit in the case.

Can the juror recall that? Is the juror here who recalls that?

JUROR NO. 5: It was me.

THE COURT: I will speak to you in a moment. The other jurors can retire along with the alternate jurors, but please do not deliberate until we know precisely when to start and I will tellyou when to start. Just hold your deliberations up until I tell you and we will go on in just a minute.

All right, you may retire except for the gentleman who just raised his hand.

(The jury with the exception of Juror No. 5 left the courtroom)